SUPREME COURT OF APPEALS OF VIRGINIA.

WYTHEVILLE.

SOUTH ROANOKE LAND CO. v. ROBERTS.*

June 20, 1901.

1. PLEADING—*Plea under section 3299 of Code—Date of valuation of property.* A plea of special set-off under section 3299 of the Code which sets up the worthlessness of property which formed the consideration of the contract, which was fraudulently procured, must aver worthlessness at the time of the contract, and not at the date of plea.

2. PLEADING—*Pleading under Code, section 3299—Rescission.* If the fraud or misrepresentation relied on as a defence be such as requires a rescission of the contract and a reinvestment of the vendor with the title, the plea provided for by section 3299 of the Code is not available, because a court of law is incompetent to do complete justice between the parties. There can be no rescission in such action, neither can there be a plea in bar based upon the right and offer to rescind.

3. PLEADING—*Demurrer to evidence—Form of verdict.* Where the only defence set up to the plaintiff's cause of action is for damages by way of a special set-off under section 3299 of the Code, and the plaintiff demurs to the defendant's evidence, the verdict should be for the defendant, assessing his damages at a stated sum, subject to the opinion of the court upon the plaintiff's demurrer to the evidence; and if, upon the demurrer to the evidence, the law be with the plaintiff, then for the plaintiff, whatever sum the jury ascertain to be due.

Error to a judgment of the Circuit Court of Culpeper county, rendered March 28, 1899, in an action of debt, wherein the plaintiff in error was the plaintiff, and the defendant in error was the defendant.

Reversed.

The facts sufficiently appear in the opinion of the court. The defendant withdrew his plea of the general issue, and the case was tried on the issues made by five special pleas, all filed under section 3299 of the Code.

Barbour & Rixey, for the plaintiff in error.

G. D. Gray, and *Hay, Jeffries & Perry*, for the defendant in error.

KEITH, P., delivered the opinion of the court.

The South Roanoke Land Company sued J. J. Roberts in the Circuit Court of Culpeper county upon four negotiable notes, each for the sum of $266, dated May 20, 1891, payable to the Crystal Springs Land Company and by that company endorsed to the plaintiff. The

*Reported by M. P. Burks, State Reporter.

defendant went to trial upon special pleas. In plea No. 1 he states that the notes were made for the purchase price of four lots of land sold by the Crystal Springs Land Co. to the defendant and one E. H. Stewart, which lots were represented to be in the city of Roanoke. The whole purchase price was $1,600, of which Roberts paid one-third in cash and gave his four notes for the balance, which are the notes in suit. Roberts then avers that the contract for the sale of the lots on which the notes were founded was procured from him by false and fraudulent representations made to him by the Crystal Springs Land Co. through its President, E. H. Stewart, who represented that the lots were valuable and salable; that the company had during a week of April, 1891, sold $125,000 of its land in said city, and that in thirty days their sales had amounted to about $500,000; that he had been permitted to select twelve of the best lots for himself at the price of $400 each, one-half interest in which he would sell to the defendant if said defendant would make the cash payment, he (Stewart) to make the first deferred payment, and the two together to make the third and last payment; that relying upon these assurances defendant entered into the contract for the purchase of the lots, and executed the notes filed with the declaration; that all of said representations were untrue, and that by reason of the matters in the plea contained the defendant has sustained damages to the amount of $1,500, which he is entitled to have set-off against the demand of the plaintiff.

This plea was objected to by the plaintiff as being in violation of the rule which requires singleness of issue, as it embraces in one plea several distinct false representations, each of which the plaintiff claims should have been pleaded separately, if at all.

The court overruled this objection and permitted the plea to be filed, and thereupon the defendant filed pleas setting out separately the several representations embraced in the first plea. To these pleas the plaintiff objected upon the ground that the representations, whether pleaded in one or several pleas, constituted no defence to the action. This objection the court overruled, and permitted the pleas to be filed; and thereupon the plaintiff joined issue upon them, the jury was sworn, the evidence for plaintiff and defendant introduced, the plaintiff demurred to the defendant's evidence, and the jury rendered the following verdict:

"We, the jury, upon the issues joined, find for the plaintiff the sum of $1,066.64, with interest from July 18, 1892, until paid, subject to the opinion of the court upon the plaintiff's demurrer to the evidence."

Upon this verdict the court entered a judgment for the defendant, and the case is before us upon a writ of error.

The five special pleas upon which the case was tried were filed under section 3299 of the Code. The plaintiff had made out its case by the introduction of the notes of the defendant duly executed and delivered. To avoid his liability upon them, the defendant pleaded that he was induced to execute them by the false and fraudulent representations of the plaintiff which induced him to purchase the lots, for the price of which the notes were executed. The Circuit Court held the pleas to be sufficient, and it then devolved upon the defendant to make good by proof what he had averred in his pleas. It was for him to show not the value of the lots at the time of the trial, but their value at the date when he became the purchaser. There is no evidence whatever upon this subject. Indeed, a fair inference from the evidence is that, at the date of the purchase, the lots were reasonably worth the price which the defendant undertook to pay. There is certainly no proof and no fact from which the jury were authorized to infer that such was not the case.

As was said by Buchanan, J., in *Tyson* v. *Williamson*, 96 Va. 639: "If the defence is based upon equitable grounds which require a *rescission* of the contract, and a reinvestment of the vendor with the title, the plea provided for by that statute is not available, because the court of law is incompetent to do complete justice between the parties. *Mangus* v. *McClelland*, 93 Va. 786; 4 Minor's Inst. 796.

"There can be no rescission in this action; neither can there be a plea in bar based upon the right and offer to rescind. If the fraud or misrepresentation relied on is such as to justify a rescission of the contract, as to which we express no opinion, that relief can only be had in a court of equity.

"The pleas were bad both at common law and under the statute, and were properly rejected by the Circuit Court.

"Plea No. 4 was evidently framed with reference to the provisions of sec. 3299 of the Code, but it does not aver that the lot, which the defendant was induced to purchase by the alleged misrepresentations of the plaintiff's agent, was not worth, at the date of his contract, what he agreed to give for it, but avers that it was worthless at the time the plea was filed. That averment is not sufficient. His damages, if any, are to be ascertained and fixed as of the date of the contract,

the time the fraud is alleged to have been committed, and not as of the date his plea was filed."

The case stated is directly in point, and is conclusive of that under consideration.

There is one objection, however, urged by the plaintiff in error, which should not be passed over without some comment. The plaintiff demurred to the defendant's evidence. The jury found a verdict upon the issues joined in favor of the plaintiff for the entire sum demanded by him. The pleas filed by the defendant aver that he had suffered damage by reason of certain representations which had induced him to enter into the contract, but the jury assesses by its verdict no damages against the plaintiff, nor is there any alternative finding in whole or in part in favor of the defendant. It would seem that in such a case the proper verdict upon a demurrer to the evidence would have been: "We, the jury, upon the issues joined, find for the defendant and assess his damages at a stated sum, subject to the opinion of the court upon the plaintiff's demurrer to the evidence; and if upon the demurrer to the evidence, the law be with the plaintiff, then: We find for the plaintiff on the issues joined the sum ascertained to be due him." We mention this, however, merely by way of precaution, lest our silence might be construed into an approval of the mode of proceeding here adopted.

We are of opinion that the judgment of the Circuit Court should be reversed, and this court will proceed to enter such judgment as the Circuit Court should have rendered. *Reversed.*

NOTE.—This case presents several interesting features. The action was by an indorsee against the maker of negotiable notes. The defendant's plea of fraud in the original consideration between the *maker and payee* seems to have been treated throughout, both in the lower and appellate court, as a proper defence to the action. That a *bona fide* holder in due course takes negotiable paper free from equities between the original parties is such familiar learning that we feel sure there must have been other material facts in the record, not apparent from the opinion.

Another interesting feature of the case is that it affords the example of a *plaintiff* demurring to the evidence. Not that this is irregular, but the practical illustration of a plaintiff demurrant is believed to be rare in Virginia. Practitioners will observe the suggestions of the court as to the proper practice in such cases. That is, the jury should not find for the *plaintiff* (demurrant), but "for the *defendant*, . . . subject to the opinion of the court upon the plaintiff's demurrer to the evidence; and if upon the demurrer to the evidence the law be with the plaintiff, then we find for the plaintiff upon the issues joined, and assess his damages at $——."

The principle that one cannot, under section 3299 of the Code, recover damages for failure of consideration in the purchase of real estate, where a rescission of the contract and a reinvestment of the vendor with the title is required to do complete justice, is too well settled for serious question. It was first enunciated in *Shifflett* v. *Orange Humane Soc.*, 7 Gratt. 297 (1851). And as it is believed that the principal case makes a new departure in the construction of sec. 3299, permitting equitable pleas, it may not be amiss to trace the course of judicial decision from *Shifflett* v. *Orange Humane Society* down to the present time. In the parent case the action was debt on a bond executed as the purchase price of real estate. The defendant filed a special plea, *not claiming damages*, but substantially stating facts entitling him to a *rescission*, and, indeed, practically asking for a rescission. In a brief half-page opinion the court held that such relief could not be had under the Act of 1831 (now sec. 3299), but in a court of equity only. Here, it is to be observed, the defendant's claim could not be allowed without reinvesting the plaintiff with the interest sold to the defendant, and such reinvestment could not be accomplished in a court of law. The court distinctly places its judgment on this ground.

The question again arose in *Watkins* v. *Hopkins*, 13 Gratt. 743 (1857). The action was again debt on a bond, for $500—the third and last installment of the purchase price of real estate. *Title had not yet been made* by the vendor. The plea alleged failure of the plaintiff to make title according to agreement—and though the defendant had already paid $1,000 of the purchase money, and was liable on the third installment of $500 sued on, he *claimed as damages only $250.* Here it was clear that complete justice could not be done under this plea in the action at law. If the plea had been allowed and proved, the $250 damages claimed would have been set off against the bond of $500, and the plaintiff would still have had judgment for $250, the residue, which, added to the $1,000 already paid by the defendant, would have left, as the result of the litigation, the plaintiff with $1,250 of the purchase money in his pocket, and the defendant still without legal title—thus necessitating a suit in equity for specific performance, or for rescission—if, indeed, he would not be left without any remedy whatsoever. Hence the court held that the case was proper only for a court of equity, and relief could not be had under the Act of 1831 (sec. 3299), and that therefore the plea was bad. The court comments upon the fact that the *quantum* of damages claimed indicated that the plea was not intended as a waiver of specific performance in a court of equity, by demanding complete reimbursement in the form of damages. The inference is irresistible that if the defendant had claimed *complete damages*—damages sufficient to offset the plaintiff's claim and give defendant a recovery over for previous installments paid, the plea would have been allowed (see page 745). The defendant not having legal title, no rescission in such case would have been necessary. It was held, however, in the same case, that a special plea alleging damages for failure to deliver possession of the premises and for injury to the premises by the seller after the contract of sale was proper under the statute.

In *Mangus* v. *McClelland*, 93 Va. 786 (1895), the defendant had bought real estate from the plaintiff at the price of $2,000—one-third of which had been paid in cash. Title had been made to the defendant, who executed a deed of trust to secure the remainder of the purchase money. In an action to recover the residue of the purchase money, defendant filed a special plea under the statute, alleging

fraudulent representations on the part of plaintiff's agent, upon which representations he had relied in entering into the transaction. Defendant's plea further *waived all claim to the land*, demanded damages to the full amount of the stipulated purchase price, paid and unpaid, and *tendered a deed reconveying the land* to the plaintiff. Here was a clear attempt and offer to *rescind* the whole transaction, expressed in plain language on the face of the plea—an attempt which, it goes without saying, failed, and properly, under the authorities already cited.

(It is interesting to notice, in passing, that the proceeding here was by *motion*, and no question was made as to the propriety of a special plea under sec. 3299, which in terms applies only to *actions*.)

In *Tyson* v. *Williamson*, 96 Va. 636 (1899), the action was again debt on a bond for the purchase of real estate, but whether for the whole purchase price or not does not appear. Defendant was invested with title to the property. The special plea alleged fraudulent representations inducing the purchase and an *offer on the part of defendant to rescind* the contract. It *alleged no damages*, but merely asserted that by reason of the premises defendant was not liable on the bond. Here not only was the plea bad in form, but palpably *rescission* was the only proper remedy, and the only relief contemplated by the plea. If the plea had been allowed and established, defendant would have been relieved of paying the purchase money, but would still have had title to the land.

Up to this point in the judicial history of the statute, so far as concerns special pleas to actions for the purchase price of real estate, the rejected pleas all contemplated *rescission* of the entire contract and a *reinvestment of title* in the plaintiff, or (as in the *Watkins* case) a recovery of partial damages only, with the necessity of further proceedings in equity to invest defendant with the title.

This brings us to the consideration of the principal case.

The action was on notes representing a *part* of the purchase price of real estate, the residue having been paid. The report does not disclose whether title had been conveyed or not, but this is believed to be immaterial. The defendant's special pleas set up fraudulent representations, and demanded, not *rescission* in lieu of damages, as in *Shiflett* v. *Orange Humane Society*—nor damages measured by *part* of the purchase money, as in *Watkins* v. *Hopkins*—nor *rescission* with a *tender of reconveyance*, as in *Mangus* v. *McClelland*—nor an *offer to rescind without allegation of damages*, as in *Williamson* v. *Tyson*—but *complete damages to the full amount of the purchase money*. Nothing was said in the plea about rescission, nor was rescission at all essential to complete relief. If defendant was *not* already invested with the title, no reconveyance was necessary, and, if satisfied of the truth of the plea, the jury might have given the complete damages claimed (equal to the purchase money, paid and unpaid), and thus complete relief would have been afforded in the action at law—the case suggested by the court in *Watkins* v. *Hopkins*. On the other hand, if title *was* in defendant, then by his plea he impliedly waived rescission and consented to keep the property at what the jury might think it was worth, just as a defendant, sued for the purchase price of a horse which he has not returned, nor offered to return, by pleading damages for a false warranty, impliedly agrees to waive rescission, keep the horse and accept damages. If, in the principal case, the jury thought the fraud established and the lots worthless at the time of the purchase, they might have given the full damages claimed, thus, in effect, restoring the entire purchase money. Or, if the

jury thought the property worth half the agreed price, damages might have been reduced accordingly. The point meant to be made here is, that these pleas did not contemplate rescission, nor was rescission at all essential to complete justice in the action at law under the pleas tendered.

If this case is to be followed, the result will be that the special plea under sec. 3299 can never be set up to a demand for the purchase money of real estate. And, as no special plea is necessary to set up fraud, failure of consideration, breach of warranty, etc., in an action not on a sealed instrument in order to reduce plaintiff's recovery (*Columbia etc. Assoc'n* v. *Rockey*, 93 Va. 673), it would follow that one sued in debt or *assumpsit*, on a note for the purchase price of real estate, title to which has been conveyed to him, could not repel plaintiff's claim by showing under the general issue, that by reason of fraudulent representations of the plaintiff he had been damaged so much, say $5 an acre, on an agreed purchase at $20 an acre—a proposition to which the court would scarcely assent. But whether the defendant (with title) place his *quantum* of damages at a sum sufficient to repel the *whole* or merely a *part* of the plaintiff's demand, could not possibly affect the validity of his defense. The only difference in substance between such a defense under the general issue and under the statute is, that in the former case (under the common law doctrine of recoupment) the defendant can have no recovery over against the plaintiff, but can merely repel, in whole or in part, the claim asserted; whereas, under the statute (sec. 3299) he may not only repel the plaintiff's claim, but may have a recovery over. Otherwise, whatever is a good defense under the plea of *non assumpsit* or *nil debet* may be made by a special plea under the statute.

It was distinctly held in *Watkins* v. *Hopkins* (*supra*) that in an action on a bond executed for the purchase money of real estate, damages may be set up under the statute for a deficiency in quantity, or for failure to deliver possession at the time or in the condition stipulated, because no rescission is here contemplated or needed, and complete justice may be done in the action. If this be so, why might not damages have been recovered in the principal case for failure to deliver lots of the value and character as fraudulently represented?

Section 3299 is one of the most valuable sections in the entire Code. It is based upon a wise policy, and our regret to see its scope narrowed, as the principal case seems to narrow it, is excuse for so voluminous a note on the subject.

The case seems to have been properly decided on its merits, the defendant having failed to prove that the property at the date of his purchase was not worth what he paid for it.

BANKERS LOAN & INVESTMENT CO. v. HORNISH AND OTHERS.*

Supreme Court of Appeals: At Wytheville.

July 4, 1901.

1. JUDGMENTS—*Unrecorded deed by judgment debtor—Subsequent deed recorded.* If a grantee of land who has failed to record his deed induce the grantor to make a new deed to the grantee's wife, who records the same, and, together

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